

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Luis Rivera  
Petitioner

Vs.

Civil Action No. 2004-12717-RGS

David Nolan  
Respondent

PETITIONER'S MEMORANDUM  
SETTING FORTH THE FACTS AND LAW  
OF THE PETITIONER'S 2244(d)(1)(D) CLAIM

Now comes the petitioner, Luis Rivera pro-se, in the above entitled action who respectfully moves this Honorable Court to consider the petitioner's argument that his preeviously filed petition should be deemed timely filed based under 28 U.S.C §§2244(d)(1)(D).

INTRODUCTION

The petitioner Luis Rivera, was convicted of two counts of first degree murder on June 29, 1992.

On or about January 14, 2003, the petitioner received the "first" of "three" affidavits through the mail from Jose Pacheco co-defendant. This "first" affidavit was sign on November 15, 2002, which consisted of his perjured testimony during a State Trial regarding the conviction of this petitioner for the instant matter.

The petitioner received a "second" affidavit on or about June 12, 2003, this second affidavit consist of an "Exculpatory Agreement" of a "Bail Release and Dismissal

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of Murder Indictments; this affidavit was sign on May 16, 2003.

The petitioner then received a "third" affidavit some time after October 7, 2003, that consisted of the first two affidavits put together, this affidavit was sign on October 7, 2003.

The petitioner filed his pro-se State Motion For New Trial Mass. Crim. P. Rule 30(b) on November 10, 2003; which was given to the prison officials on November 5, 2003, under the mail box rule. *Houston v. Lack*, 487 U.S. 266, 270, 276 (1988); *Fernandez v. Artuz*, 402 F.3d 111, 116 (2nd Cir. 2005); *William v. Forg*, 139 F.3d 737, 739 (9th Cir. 1998).

In the petitioner's above Motion For New Trial 30(b) he wrote the date it was given to prison officials. See. enclosed Exhibit #7.

The petitioner tried to get the Docket Entries of Mr. Jose Pacheco, by writing the Clerk Of Court in Hampden County on January 2, 2001, but to no avail did he receive the Docket Entries. See... a copy of said letter Exhibit #1.

Had the petitioner been able to acquired the Docket Entries, the petitioner could not have known of the deal because a good part of Mr. Pacheco, Motion To Dismiss took place during a lobby conference with the presiding State Trial Court Judge Spina, and Mr. Pacheco Attorney Charles

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K. Stephenson, and Assistance ~~District~~ *Attorney* Safford with out a Court Reporter present. See... Exhibit #6.

On May 19, 2005, the petitioner was transfer from MCI-Cedar Junction to MCI-Norfolk, where he is presently incarcerated; where the petitioner met up with one of the "other" co-defendant Raymond Rebello regarding this matter, in contrast to the petitioner this other co-defendant (Rebello), had an evidentiary hearing in the same State Trial Court before Justice Constance M. Sweeney (who presiding) regarding the case matter hearing of Mr. Pacheco's recantation testimony this is how the petitioner acquired the Docket Entries of "Key Witness Mr. Pacheco;" via Docket Entries.

The petitioner then immediately filed supplement/amendment to the U.S. District Court to show that he had a due process violation regarding Justice Spina's decision involvement in the State Superior Court concerning Mr. Pacheco, dismissal of his murder indictment that also involved this petitioner as the co-defendant of, Mr. Pacheco; Justice Spina, was later appointed as a State Supreme Court Justice (SJC), and did make a decision in petitioner's State Motion For Leave To Appeal before Justice Spina, who was sitting during Single Justice Hearing at the (SJC) bench. 1/

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1. In light of these facts, Rivera in this instant case at bar respectfully submits for consideration that Justice Spina, should have recused himself sua sponte, eliminating any impropriety. during this petitioner's State Motion For Leave To Appeal, because he was the judge who heard his co-defendant motion to dismiss his murder indictments which was granted by (former State Superior Trial Justice Spina, who was later appointed to the State Supreme Court, and did deny this petitioner motion for leave to appeal his conviction.

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Due process was violated because Justice Spina who heard and granted this (alleged) co-defendant of this petitioner motion to dismiss his murder indictment case was granted in State Superior Trial Court, however after Justice Spina, was appointed to State Supreme Court; he failed sua sponte to recuse himself while he was sitting as the Single Justice, upon receiving this petitioner's State Trial Motion For Leave To File An Appeal under Mass. Crim. P. Rule 30(b) was denied; Due process was violated because Judge who heard case in State Court failed sua sponte to recuse himself from hearing Federal Habeas Petition. *Clemmens v. Wolfe*, 377 F.3d 322, 328 (3rd Cir. 2004).

#### Application Of Law To The Facts

The petitioner is on time even if the court consider the first affidavit to be the date on which the factual predicate of this claims could have been discovered through the exercise of due diligence. 28 U.S.C. §§2244(d)(1)(D).

The petitioner's New Trial Motion was filed on November 5, 2003. See... *Houston v. Lack*, supra at page 270, 276.

The petitioner's motion to leave for appeal in the (SJC) before Single Justice Spina, was denied December 14, 2004, which petitioner did not received until December 17, 2004.

The petitioner then filed his habeas corpus petition on December 20, 2004. See... Exhibit #8. See... *Fernandez v. Autuz*, 402 F.3d 11, 116 (2nd Cir. 2004) Federal Mail Box Rule; Rule applies, and therefore application was properly filed.

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The truthful affidavit of Mr. Pacheco with his Docket Entries and polygraph verified evidentiary hearing truthful testimony of not being present; "an actual innocence based independent due process violation or right to fundamentally fair trial because a State cannot leave a conviction in place after a credible recantation by a key main witness most likely would have change the outcome of the trial. Sanders v. Sullivan, 900 F.2d 601, 602-608 (2d Cir. 1990); (release ordered by writ of habeas corpus when key main witnesses post-conviction affidavit filed admitted the defendant shoot and kill someone). Because "little direct or circumstantial evidence supported either side's version of events. Ellsworth v. Warden, 333 F.3d 1, 9 (1st Cir. en banc 2003), (Torruella, J., concurring) and "the materiality inquiry is a context specific determination." Spicer v. Roxbury Corr. Inst., 194 F.3d 547, 560 (4th Cir. 1999).

The Bail Hearing transcript verification of a deal can support relief from habeas corpus. See... U.S. v. Bagley, 105 S.Ct. 3375 (1985); Giglio v. U.S. 405 U.S. 150,154, 92 S.Ct. 736, 766, 31 L.Ed 2d 104 (1972). In cases in which a defendant claims that the prosecution failed to inform him of a plea agreement between the State, and key material witness, if there is doubt over the existence of the alleged agreement, but substantial evidence, although circumstantial, is present which suggests that the agreement existed, the

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courts will resolve the benefit of the doubt in the defendant's favor. *Napue v Illinois*, 360 U.S. 264, 272, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959) "May have had an effect on the outcome").

However, if dismissal of charges is found to be part of undisclosed deal, then relief must be granted. *Ely v. Matesanz*, 983 F.Supp.2d 21, 35-45 (D.C. Mass. 1997); *Jenkins v. Artuz*, 294 F.3d 284, 292-297 (2nd Cir. 2002); *William Taylor*, 529 U.S. 420, 437 (2000); *Phoenix v. Matesanz*, 189 F.3d 20, 27-29 (1st Cir. 2001); *Banks v. Dretke*, 124 S.Ct. 1256, 1268-1269 (2004).

The petitioner's conviction was unlawfully obtained by the prosecutor's knowing and deliberate presentation of false testimony and concealment of a Bail Release Deal with co-defendant Jose Pacheco, whose charges were dismissed as a reward for his perjured testimony in violation of the petitioner's Fourteenth Amendment Right to the U.S. Constitution his U.S. Constitution Six Amendment were also violated and Article 12 of the Massachusetts Declaration Of Right as well.

The affidavit of Mr. Jose Pacheco avers he was released on bail as part of a deal without any objection by the prosecution, Jose Pacheco did not witness the defendant committing any crime, and ~~did not~~ witness the murders [as corroborated by Pacheco's testimony conflicting with crime



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scene evidence and other witnesses]; Pacheco was at his Mother's House in Holyoke Massachusetts, at the time of the murders and was not at the crime scene. Although not admissible into evidence without stipulation of agreement from the prosecutor, Pacheco is willing to take a polygraph test, to verify he did not witness the murders, as is standard practice for Federal Prosecutors and other State Prosecutors to verify or refute a cooperating witnesses story. Schlup v. Delo, 513 U.S. 298; Sawyer v. Whitley, 505 U.S. 333; Murray v. Carrier, 447 U.S. 478, 495. In light of new evidence, it is more likely than not, that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.

Plainly speaking, the actually innocent petitioner Luis Rivera, has only one chance to vindicate himself and the risk of death in prison should he be denied a hearing would constitute a miscarriage of justice.

And if for any reason petitioner's filling dates are proof of his "special diligence" that his 28 U.S.C. §§2244(d)(1)(D) one year time deadline from the time when he first learned of Mr. Pacheco Affidavits are on time.

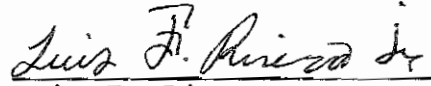
#### Conclusion

For all of reasons stated above, and in the interest of justice, this Honorable Court should deem the petitioner's petition timely pursuant to 28 U.S.C. §§2244(d)(1)(D).

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WHEREFORE: petitioner prays for relief, that he will be granted his petition for habeas corpus that was previously timely filed to this Honorable Court, for foregoing reasons as stated herein his eight (8) Memorandum Setting Forth Facts.

Respectfully submitted



Luis F. Rivera, pro-se  
MCI-Norfolk  
Post Office Box #43  
Norfolk, MA 02056-0043

CERTIFICATE OF SERVICE

I, Luis Rivera, petitioner pro-se certifies on this Day: 30, Month: 11, Year: 2007, submits a eight (8) page attached hereto: Memorandum Setting Forth The Facts And Law pursuant to 28 U.S.C. §§2244(d)(1)(D) that he had filed a timely habeas corpus petition to this Honorable Court. The petitioner has also forwarded a copy of the same via 1st class mail all postage fees prepaid;

To: Maura D. McLaughlin  
Assistance Attorney General  
One Ashburton Place  
Boston, MA 02018

Signed Under Pains and  
Penalties Of Perjury

  
Luis F. Rivera, pro-se



FILED  
IN CLERKS OFFICE  
2007 NOV 30 A 10:03  
U.S. DISTRICT COURT  
DISTRICT OF MASS.

EXHIBIT #1

Letter to the court/w

October 7, 2003 Affidavit of Jose Pacheco (5 page)

Mr. Luis F. Rivera Jr.  
N.C.C.I Gardner  
P.O. Box 466  
Gardner, MA. 01440-0466

January 2, 2001.

Clerk Of Courts  
Marie G. Mazza, ESQ  
Hampden Superior Court  
P.O. Box 559  
Springfield, MA. 01102-0559

RE: Docket Entries Of Jose A. Pacheco,  
A Co-defendant. Indictment NO: 91-2243-46.

Dear Clerk:

I am requesting that a copy of Mr. Pacheco's  
Docket Entries. be mail to me at the above address  
Thank you for your Time, and Attention to this matter.

Sincerely,

*Luis F. Rivera Jr*  
Luis F. Rivera Jr

cc:File

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN COUNTY

SUPERIOR COURT  
NO(S) 91-2247-2251

COMMONWEALTH

V.

LUIS FERNANDO RIVERA, JR.

AFFIDAVIT TO RECANT FACTS OF TESTIMONY  
I GAVE AT THE DEFENDANT'S TRIAL

I, Jose Pacheco, do hereby swear and attest that the following facts are true to the best of my knowledge and belief.

I make this affidavit in support of my wish to recant certain facts I gave in my testimony at the trial of the above named defendant.

1. I am presently an inmate incarcerated at M.C.I. Concord. My inmate identification number is W70663

2. At trial, in June of 1992, I testified that the defendant held a gun to my head because I was running traffic lights and was likely to call attention my vehicle. The defendant never held a gun to my head or to any other part of my person.

3. At trial, I testified that I witnessed the defendant shoot Angel Carcano and Guillermo Santiago as I claimed I was at the scene of this crime. I was not at this, or any other crime scene, during the commission of the aforementioned shootings and did not witness any crime being committed by the defendant.

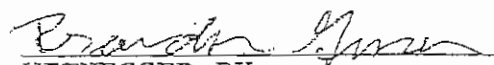
4. At trial, I testified that I accompanied the defendant to the stated crime scene. I did not as the defendant dropped me off at my mother's home on Main Street in Holyoke prior to the time

the alleged crime was said to have been committed.

I am willing to testify to the above matters in court and under oath.

Signed and sworn to under the pains and penalties of perjury on this 15<sup>th</sup> day of November, 2002, at M.C.I. Concord in Concord, Massachusetts.

 9/15/02  
JOSE PACHECO

 9/15/02  
WITNESSED BY



**COPY**

EXHIBIT  
#6  
9 pages

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT  
CRIMINAL NO.

COMMONWEALTH

vs.

RAYMOND RIOS REBELLO

MEMORANDUM OF DECISION AND ORDER DENYING DEFENDANT'S  
SUBSTITUTE MOTION FOR A NEW TRIAL

The defendant Raymond Rios Rebello was convicted in January 1993 of being an accessory before the fact to the deliberately premeditated first degree murders of Angel L. Carcano and Guillermo Santiago. In the appeal of his convictions to the Supreme Judicial Court, the defendant filed a "Substitute Motion For A New Trial" on the grounds that the Commonwealth violated the defendant's confrontation and due process rights by failing to fully disclose inducements to Jose Pacheco, a key prosecution witness, in exchange for his testimony and secondly, his right to a fair trial was violated by the admission of inflammatory and irrelevant evidence of uncharged misconduct. The motion was remanded to me, as the trial judge.

After consideration of the evidence presented during the new trial motion hearing, the submissions of the parties and my knowledge of the trial evidence, the defendant's substituted motion for a new trial is **DENIED** for the reasons stated herein.



### PRIOR PROCEEDINGS

In September 1991, a Hampden County Grand Jury returned indictments against the defendant charging him with being an accessory before the fact to the murders of Carcano and Santiago, as well as conspiring to murder them and being an accessory after the fact to their murders. The Commonwealth entered a nolle prosequi to the accessory after the fact indictments and the remaining indictments proceeded to trial before a jury in August 1992. The jury was unable to reach a verdict on any of the indictments and a mistrial was declared.

In January 1992, the defendant was retried on the accessory before the fact to murder indictments and was found guilty by the jury.<sup>1</sup> Within a week of the conviction, the defendant's trial counsel filed a "Motion for Entry of a Not Guilty Verdict Not Withstanding the Verdict And In The Alternative A Motion For A New Trial." I issued preliminary procedural orders to the parties in preparation for consideration of the motion. As the record reveals, the defendant filed some partial responses but the Commonwealth did not file any. As the procedural morass deepened, I was finally informed that a notice of appeal to the Supreme Judicial Court had been entered on the same day as the Motion for Judgment of Acquittal Not Withstanding the Verdict, thus this court no longer had jurisdiction of the case.

In late 2003, it was brought to my attention that our docket still showed that the case was on appeal, but the usual notifications we receive during the course of an appeal did not appear on the docket. I conducted a status hearing. The defendant's trial counsel claimed that he and the

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<sup>1</sup> In his first trial, the defendant elected to have the accessory before the fact and the conspiracy indictments tried together. This did not occur in the second trial. The Commonwealth entered a nolle prosequi on the conspiracy indictment after the second trial.

### FACTS

From the trial evidence, the jury was warranted in finding that in 1991 the defendant was associated with Pedro Ramos in an extensive illegal narcotics distribution business in the City of Holyoke. Pedro Ramos controlled the business. Ramos and several of his cohorts were arrested on August 15, 1991 on charges of trafficking in cocaine.<sup>3</sup> The defendant was not present during the raids and was not arrested.

The defendant, along with other members of the organization, determined that the victims, Angel Carcano and Guillermo Santiago, had provided information to the police that led to the arrest of Ramos and some of his associates. Carcano and Santiago were, at the most, on the fringes of the Ramos organization. Several days before the murders of Carcano and Santiago, the defendant began to solicit individuals to kill Carcano and Santiago for their perceived treachery. In the ensuing days, the defendant arranged for Israel Diaz and Luis Rivera to carry out the murders. The defendant planned the method and means by which the killings would occur and procured the services of Jose Pacheco to drive the unwitting victims to the execution site.

On August 24, 1991, the killings were carried out in accordance with the defendant's directives. Guillermo Santiago was 32 years old when he was shot to death that day; Angel Carcano was fifteen years old.

Specifically, the trial evidence supporting the jury's verdict revealed that Pedro Ramos and David Soto were partners in a drug organization in New York City before 1991. Ramos

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<sup>3</sup> See *Commonwealth v. Alvarez*, 422 Mass. 198 (1996) affirming the convictions of Ramos and others for trafficking in cocaine.

drugs were delivered to the Ramos apartment assistants would “work the table”, meaning they would process and package the drugs for sale. Once the drugs were packaged, Ramos and Soto distributed them to the managers, who in turn would distribute them to the street dealers known as “pitchers.” The pitchers would then sell the drugs to customers on the streets in Holyoke and parts of Springfield. Account ledgers were kept and ultimately discovered by the police.

Discipline within this inherently sordid organization was kept by equally sordid means. It was clear from the evidence that individuals who stole or did not follow orders were violently dealt with by designated enforcers within the organization. The defendant was aware of this and as a “manager” participated in it.

Needless to say, the ever-expanding Ramos organization came to the attention of law enforcement officials. On August 15<sup>th</sup>, Holyoke police officers searched the Hampden and Pleasant Street apartments pursuant to search warrants. At those locations the police found Pedro Ramos and some of his associates along with six vials of crack cocaine, a wallet belonging to one of the associates present in the apartment, Jeannette Pizarro. The wallet contained a receipt for a safety deposit box located at a New York bank. A search of the box by New York authorities revealed \$19,000.00 in cash. A police scanner, numerous pagers and paperwork were also found at the Hampden Street location. In the adjacent 475 Pleasant Street location the officers discovered six loaded semiautomatic handguns and a sawed off shotgun. From a closet in that apartment, they unearthed a leather bag containing 650 vials of crack cocaine as well as a hamper containing 508 vials of crack cocaine and more than \$6,500.00 in currency. A drug ledger as well as paraphernalia for the manufacture and distribution of narcotics were also seized from the Pleasant Street location. The defendant’s name was found several times on the pages of

Pacheco encountered Hernandez, Diaz and the defendant. The three men informed Pacheco that the victims had informed on Ramos to the police. The defendant also told Pacheco that the victims stole items from Ramos's apartment. The defendant told Pacheco that Santiago and Carcano were going to be killed and that Ramos would pay individuals for assisting in killing them. He demanded to know what, if anything, Pacheco knew about the two men. Pacheco asserted at trial that he told the defendant he did not want to be involved and he also claimed that he later warned Santiago that he was a marked man.

However, a couple of days later, Pacheco and the defendant met and Pacheco drove the defendant to the parking lot behind 828 Hampden Street, where the two victims were working on a car. Pacheco testified that he did this so that the defendant could see what the victims looked like. Several hours before the murders Pacheco drove to the intersection of Elm and Hampshire Streets where he encountered Diaz, Rivera and the defendant. Pacheco drove the three men to a local convenience store at the defendant's direction. In the store, the defendant informed Pacheco that Pedro Ramos had ordered that Santiago and Carcano must be killed. The defendant told Pacheco that he would have to "get these people for us" because Pacheco was friendly with Santiago. In his testimony Pacheco claimed that he at first declined but when the defendant threatened to kill him and his family if he did not cooperate, Pacheco agreed to find Santiago and Carcano. He located them at their usual spot in the parking lot of 828 Hampden Street and invited them into his car so they could get "high." Pacheco testified that the victims were drunk and although he tried to warn them of what might happen, neither Santiago nor Carcano took the warning seriously.

Pacheco drove the unsuspecting victims back to the convenience store where Diaz and

1. **The Defendant's Claim of Violation of His Confrontation and Due Process Rights**

The same grand jury that indicted the defendant also indicted Jose Pacheco for the murder of the victims. The murder indictment against Pacheco was dismissed on June 1, 1993 when the court (Spina, J.) allowed Jose Pacheco's motion to dismiss.

The defendant contends that the jurors were never informed that Pacheco had been promised he would receive a benefit for his testimony. That was not the case. The Commonwealth never explicitly or implicitly promised Pacheco that his case would be dismissed. Indeed the Commonwealth objected to the dismissal of the case by the court, although they did not appeal the court's dismissal order. Before trial the Commonwealth did provide an inducement to Jose Pacheco, who was represented by counsel. The inducement was in writing and was provided to the defense. It states:

Your cooperation will be taken into consideration by this office. Your complete and truthful testimony will benefit you on disposition of your case. It is our intention to treat you fairly.

During trial the prosecutor questioned Pacheco with respect to any understanding he had with the Commonwealth. On this point, the prosecution established that Pacheco was charged with the murders of Santiago and Carcano; that he had testified against other individuals charged as a result of the murder; that he had been released and not held on bail. Pacheco testified that he expected that he would be given consideration by the Commonwealth in exchange for his cooperation. The defendant's trial counsel vigorously cross examined Pacheco as to his motivation to testify including what he might expect from the Commonwealth in exchange for his testimony. Both the prosecutor and trial counsel carefully followed the guidelines established in



charges against Pacheco on the grounds of duress. ADA Safford was the prosecuting attorney in the cases arising from the murders of Santiago and Carcano, including the indictments against the defendant. The dealings between Pacheco's attorney and the District Attorney's office fall into two categories. (1) negotiations for Pacheco's cooperation as a witness in return for consideration of the charges against him and (2) the positions taken by Pacheco's counsel and the District Attorney with respect to the motion to dismiss the murder charges against Pacheco.

As to the cooperation inducement, each attorney testified that Mr. Safford promised that Mr. Pacheco's testimony would be taken into consideration in evaluating any potential offer the District Attorney might make on the charges against Pacheco. ADA Safford testified that he knew the District Attorney would in all likelihood insist that Pacheco plead guilty to no less than second degree murder in exchange for his testimony. This was the District Attorney's standing policy and Mr. Safford complied with it by offering only "consideration" in exchange for Pacheco's testimony. Once Pacheco agreed to testify in exchange for "consideration" on the charges against him, Mr. Safford had no occasion to revisit the issue until 1993 when Pacheco's attorney filed a motion to dismiss the indictments.

Attorney Stephenson hoped that Mr. Pacheco's cooperation would bring more than an inducement for Pacheco to plead to second degree murder charges. Mr. Stephenson spoke with District Attorney William Bennett in the early stages of the cases against the various joint venturers, which includes the defendant. The District Attorney informed Mr. Stephenson that he might consider agreeing to Pacheco pleading to second degree murder but to nothing less than that. Mr. Stephenson was insistent that the charges against his client were vulnerable because of what he felt was an almost airtight defense of duress. The District Attorney was unswayed by this



the motion to dismiss the two murder indictments and the two conspiracy to commit murder indictments which the grand jury had handed down against Mr. Pacheco.

My role is not to review Judge Spina's decision. The question for me is whether or not there was any sub rosa agreement between the prosecutor and Pacheco's defense counsel to reward Pacheco for his testimony against the defendant by concocting a strategy to somehow convince a judge to dismiss the murder charges against Pacheco? There is no credible evidence that Attorney Stephenson and Assistant District Attorney Safford did anything other than that to which they testified.

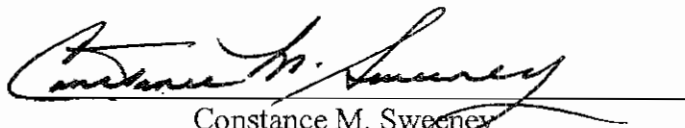
I firmly reject Mr. Pacheco's testimony offered during the evidentiary hearing that he had no involvement in the murders nor did the defendant. Pacheco says his trial testimony was based on his expectation that the Commonwealth would arrange for his freedom if his testimony was in accord with the prosecution's theory of the case. The trial evidence established beyond question that Pacheco drove Santiago and Carcano to the execution site knowing full well that his other two passengers, Rivera and Diaz, intended to murder Santiago and Carcano. Indeed his description of how the wounds were inflicted on the victims was entirely consistent with the medical examiner's objective findings.

Mr. Pacheco walked away from these murders as a free man. Now he is in prison serving substantial sentences for armed robbery, assault and battery by means of a dangerous weapon and assault and battery; all arising from an unrelated incident. See the unpublished decision in *Commonwealth v. Pacheco*, 62 Mass.App.Ct.1114 (2004). There is little question that Pacheco's recantation is an effort to improve his lot among some of his fellow inmates, rather than a genuine desire to tell the truth.

exercised authority within it as contrasted with the *Rivera* defendant who was not a member of the Ramos organization. Also note should be made that the jury was instructed on the proper use of the challenged evidence.

**ORDER**

The defendant's Substitute Motion for a New Trial is **DENIED**. The Hampden County Clerk of Courts will transmit a copy of this decision to the Clerk of the Supreme Judicial Court for filing in SJC No. 09174.

  
Constance M. Sweeney  
Justice of the Superior Court

Dated: November 18, 2005

FILED  
IN CLERKS OFFICE  
2007 NOV 30 A 10:03  
U.S. DISTRICT COURT  
DISTRICT OF MASS.

EXHIBIT#7  
20 Pages

Defendant's First VERIFIED  
Motion For NEW TRIAL

June 14, 2004

Maura Doyle, Clerk  
Supreme Judicial Court  
Single Justice Session  
One Beacon Street  
Boston, Ma 02108

Re: Commonwealth v. Rivera, SJC #04- 0338 Chapter 278,  
§33E Application For Leave To Appeal.

Dear Clerk Doyle:

Please find inclosed for filing in the above-entitled matter, an exact **TYPED** copy of the "Defendant's First Verified Mass. Crim. P. Rule 30(b) Motion For A New Trial With Evidentiary Hearing And Assignment Of Counsel Requests."

For the Court's convenience, would you please **SUBSTITUTE** this enclosed **TYPED** copy of the Defendant's Motion with the hand-written copy originally filed.

Moreover, the defedant filed his Chapter 278, §33E Application For Leave To Appeal on March 29, 2004, and he has yet to receive a docket number and or response to his accompanying motion (ASSIGNMENT OF COUNSEL). The Defendant would greatly appreciate it if the Clerk would inform him regarding these matters.

Thank you very much for your time and attention to these very important matters.

Very truly yours,



Luis Rivera, w-52832  
POst Office Box 100  
South Walpole, Ma 02071

Cc: William M. Bennett, Hampden County District Attorney

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT DEPT.

COMMONWEALTH

No. 91-2247 THAO  
91-2251

HAMPDEN COUNTY  
SUPERIOR COURT  
FILED

NOV 10 2003

Marie S. Magg  
CLERK-REGISTRAR

LUIS RIVERA

DEFENDANT'S FIRST VERIFIED  
MASS. CRIM. P. RULE 30 (b) MOTION  
FOR A NEW TRIAL WITH EVIDENTIARY  
HEARING AND ASSIGNMENT OF COUNSEL REQUESTS

Now comes the defendant, in the  
Above-entitled matter, and moves this court  
FOR A NEW TRIAL pursuant to MASS. CRIM. P.  
Rule 30 (b), while requesting an evidentiary  
hearing and also requesting assignment  
of counsel for such hearing pursuant to  
S.J.C. Rule 3010 and MASS. G.L. c. 211D § 14  
Presenting the following meritorious grounds  
ONE Issue of ineffective appellate counsel  
Ground Two Issue of both the prosecutor  
and TRIAL Judge misstating the meaning of  
REASONABLE DOUBT Ground Three Issue of  
INEFFECTIVE TRIAL counsel who failed to

- Lot 10 -

ALL STATEMENTS MADE HEREIN ARE MADE UNDER  
PAIN AND PENALTY OF PERJURY AND ALL TRIAL  
TRANSCRIPT CITATIONS ARE TRUE AND ACCURATE.  
ALSO AFFIDAVITS FROM JOSE PACHECO AND FRANCIS ARBON.

I have a fairly clear memory of the witness Jose Pacheco's testimony, having heard it twice - both at this trial and at the trial of a co-defendant, Ivan Diaz. I simply do not believe his alleged recantation, having given the whole serious consideration. See Commonwealth v. Raymond, 424 Mass. 382, 397 (1997). The other allegations set forth herein do not raise a substantial issue requiring an evidentiary hearing. Therefore, the motion is denied without a hearing. DA JRM 11/20/03

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT DEPT.  
NO. 91-2247 THRU 91-2251

\_\_\_\_\_  
COMMONWEALTH

V.

\_\_\_\_\_  
LUIS RIVERA  
\_\_\_\_\_

DEFENDANT'S FIRST VERIFIED<sup>1</sup>  
MASS. CRIM. P. RULE 30(B)  
MOTION FOR A NEW TRIAL WITH  
EVIDENTIARY HEARING AND ASSIGN-  
MENT OF COUNSEL REQUESTS

Now comes the defendant, in the above-entitled matter, and moves this court for a new trial pursuant to Mass. Crim. P. Rule 30(b), while requesting an evidentiary hearing and also requesting assignement of counsel for such hearing, pursuant to S.J.C. Rule 3:10 and Masss. G.L.c. 211D, §14, presenting the following meritorious ground one issue of ineffective appeal late counsel, ground two issue of both the prosecutor and trial judge misstating the meaning of reasonable doubt, ground three issue of ineffective trial counsel who failed to prepare the defendant to testify and failed to object to obvious closing argument and instructional error, and ground four issue of the main state witness revealing previously undisclosed and concealed deals while recanting his perjured trial testimony.

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<sup>1</sup>All statements made herein are made under pain and penalty of perjury and all transcript citations are true and accurate. Also affidavit from Jose Pacheco and Francis Pabon.



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STANDARDS GOVERNING RULE 30 PROCEEDINGS

In deciding whether to grant a Mass. Crim. P. Rule 30(b) motion, the primary question for the motion judge is whether "justice may not have been done," Commonwealth v. Gagliardi, 21 Mass. App. Ct. 439 (1986); Commonwealth v. Harrington, 379 Mass. 444, 449 (1980); Commonwealth v. Repoza, 400 Mass. 516, 518, 523 (1987); Commonwealth v. Tucerri, 412 Mass. 401 (1992).

Our Supreme Judicial Court has repeatedly stated that "if the original trial was infected with prejudicial error, the judge has no discretion to deny a new trial," Earle v. Commonwealth, 358 Mass. 181, 184 (1969); Commonwealth v. Penrose, 363 Mass. 677, 681 (1973); Lannon v. Commonwealth, 379 Mass. 786, 788 (1980); Commonwealth v. Cook, 380 Mass. 314, 320-321 (1980).

When deciding this motion, this court must "make such findings of fact as are necessary to resolve the defendant's allegations of error of law," Commonwealth v. Sullivan, 385 Mass. 497, 502 (1982); Commonwealth v. Grace, 397 Mass. 303, 305 (1986) as the plain language of Rule 30(b) requires, Id.

The judge has broad discretion as to the manner in which a new trial motion is heard by affidavit or by receiving oral testimony, Mass. Crim. P. Rule 30 (c)(3)(4), and an evidentiary hearing on non-disclosed rewards provided a main witness in Hampden County presents a serious evidentiary hearing question, Commonwealth v. Hill, 432 Mass. 704, 710 n. 15 (2000). However, "where a substantial issue is supported by a substantial evi-

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dentiary showing the judge should hold an evidentiary hearing," Commonwealth v. Stewart, 383 Mass. 254, 260-266 (1980); Commonwealth v. Licata, 412 Mass. 654, 661-662 (1992); Commonwealth v. Meggs, 30 Mass. App. Ct. 111 (1991); Commonwealth v. Companonino, 420 Mass. 1003 (1995); Commonwealth v. Conley, 43 Mass. App. Ct. 385, 386-387 (1997); Commonwealth v. Hill, *supra*.

In decideing a Rule 30 (b) motion a judge should use a "cumulative error" analysis, Commonwealth v. Gagliardi, 21 Mass. App. Ct. 39 (1986); Commonwealth v. Cancel, 394 Mass. 5676 (1985); Commonwealth v. Bassette, 21 Mass. App. Ct. 906 (1989); Commonwealth v. Skinner, 408 Mass. 88 (1990) on the question of whether cumulative errors denied the defendant a fundamentally fair trial United States v. Dwyer, 843 F. 2d 60, 65 (1st Cir. 1988); Floyd v. Meachum, 907 F. 2d 347, 355 (2nd Cir. 1990); Berryman v. Morton, 100 F. 3d 1089, 1095, 1102 (3rd Cir. 1996); Cole v. Peyton, 389 F. 2d 224, 226-227 (4th Cir. 1968); Moore v. Johnson, 194 F. 3d 586, 622 (5th Cir. 1999); Cooper v. Sowders, 837 F. 2d 284, 286-287 (6th Cir. 1988); Williams v. Washington, 59 F. 3d 673, 682 (7th Cir. 1995); Freeman v. Class, 95 F. 3d 639, 644 (8th Cir. 1996); Conde v. Henry, 198 F. 3d 734, 741 (9th Cir. 1999); Fisher v. Gibson, 282 F. 3d 1283, 1307-1311 (10th Cir. 2000); Walker v. Davis, 840 F. 2d 834, 838 (11th Cir. 1988); Chambers v. Mississippi, 410 U.S. 284, 302-303 (1973).

#### STATEMENT OF MATERIAL FACTS

The absence of overwhelming evidence and weak, conflicting testimony by cooperating witnesses with motives to lie is set

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out in the defendant's decision, Commonwealth v. Rivera, 424 Mass. 266 (1997) incorporated herein, with incompetent atty James Couture's appeal briefs to be filed as an exhibit.

The June 29, 1992 transcript pages 55 and 97 (attached hereto) show prejudicial misstatements of reasonable doubt by both the prosecutor and the trial judge.

The affidavit of Luis Rivera shows trial attorney Alan Black's failure to prepare the defendant to testify and failure to present a full defense.

The affidavit of Jose Pacheco truthfully states he was at his mother's house and not at the crime scene; that he did not witness the defendant commit any crime and reveals an undisclosed deal, as corroborated by the affidavit of Francis Pabon.

#### SUPPORTING LEGAL GROUNDS

GROUND ONE: THE DEFENDANT'S CONVICTION WAS UNLAWFULLY AFFIRMED THROUGH THE NON-STRATEGIC OMISSION OF MERITORIOUS GROUND TWO AND GROUND THREE FROM THE DIRECT APPEAL BY INCOMPETENT AND INEFFECTIVE ASSIGNED C.P.C.S. ATTORNEY JAMES COUTURE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND MASS. DECLARATION OF RIGHTS ARTICLE 12

#### FACTS SUPPORTING GROUND ONE:

The defendant having no prior opportunity to prersent ineffective assistance of direct appeal counsel now supports a Mass. Crim. P. Rule 30(b) finding that this gound has not been waived<sup>2</sup> and attorney James Couture's failure to explain his non-strategic

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<sup>2</sup> Such a finding of no waiver was made in Commonwealth v. Perrot, Hampden No. 85-5415-18, 542-25 (09/11/01) Wernick, J., granting new trial, opinion pages 13-14 citing Comonwealth v. Cormier, 41 Mass. App. Ct. 76, 77 (1996).

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omissions supports this court holding a full evidentiary hearing at which Couture is requested to explain such omissions.

Attorney Coutures's brief omitted ground two, infra, closing misstatement of law by the prosecutor and related erroneous burden of proof instructional error, while also omitting ground three infra, ineffective assistance of trial counsel related to such constitutional errors not being objected to.<sup>3</sup>

Seven years prior to the defendant's 1992 trial these constitutional errors were held to be obvious in Commonwealth v. A Juvenile, 396 Mass 215, 217-220 (1995) and Commonwealth v. Quirk, 27 Mass. App. Ct. 258, 264 (1989).

The cumulative errors in grounds two and three were obviously stronger and more likely to win reversal of the defendant's conviction than the weak issues attorney Couture briefed and failed to federalize properly; thereby causing prejudice from loss of 28 USC §2254 Federal Habeas Corpus review rights.

#### APPLICATION OF THE LAW TO THE FACTS:

When reviewing this ground one claim a proper analysis involves the question of "whether the issues which (the defendant) claims appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial, and were obvious from the trial record that failure to present such issues amounted to ineffective assistance of

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<sup>3</sup> After being fired for covering up and gross incompetence in pro se new trial win in Commonwealth v. Dellelo, Suffolk nos. 88-3-8809 (06/09/03 Ball, J.) so-called attorney Jeffrey Baler tried to cover-up by refusing to screen and report ground one claims.

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appellate counsel," Gaines v. Matesanz, 272 F. Supp. 2d 121, 143 (D.C. Mass. 2003) quoting Commonwealth v. Sowell, 34 Mass. App. Ct. 229, 232 (1993) quoting Gray v. Greer, 800 F. 2d 644, 646-647 (7th Cir. 1985) cited with approval in Smith v. Robins, 528 U.S. 259, 288 (2001).

This court must have attorney Couture testify at an evidentiary hearing providing his explanation, of, or admission to non-strategic omissions or a federal evidentiary hearing must be held, Mapes v. Coyle, 171 F. 3d 408, 427-429 (6th Cir. 1999); Williams v. Taylor, 120 S. Ct. 1479, 1490 (2000).

After such an evidentiary hearing, attorney Couture's non-strategic omission of grounds two and three support this court granting a new trial, Roe v. Delo, 160 F. 3d 416, 418-420 (8th Cir. 1999); Commonwealth v. Perrot, supra; Commonwealth v. Skinner, Plymouth nos 90030, 90031 (08/21/01 Tierney, J.), or vacating the conviction and reinstating it to restart the one year time limit 28 USC §2244 federal habeas corpus review clock, Commonwealth v. Stubbs, 15 Mass. App. Ct. 955 (1983) because a sixth amendment "deprivation (is) subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation," United States v. Morrison, 449 U.S. 361, 364 (1981) and "the only appropriate remedy for a violation of the sixth amendment is to restore the defendant as much as possible ... to the circumstances that would have existed had there been no constitutional error," United States v. Duran-Benitez, 110 F. Supp. 2d 135, 155 (E.D. N.Y. 2000).

**GROUND TWO: THE DEFENDANT'S CONVICTION WAS UNLAWFULLY OBTAINED BY TWO RELATED MISSTATEMENTS OF PROOF BEYOND A**



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REASONABLE DOUBT IN THE PROSECUTOR'S CLOSING ARGUMENT AND IN THE JURY INSTRUCTIONS, WHICH PREJUDICIALLY INFECTED THE ENTIRE TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND MASS. DECLARATION OF RIGHTS ARTICLE 12.

**FACTS SUPPORTING GROUND TWO:**

In conjunction with ground three, infra, incorporated herein by reference, the defendant sets forth the following prejudicial cumulative errors.

During closing argument the prosecutor misstated the legal burden of proof by telling the jury:

" It's not beyond every reasonable doubt ... I mean it's possible, ladies and gentlemen, that a horde of irate individuals rode by and shot those two individuals. That's possible, but it's not probable."  
(June 29, 1992 transcript page 55).

After the prosecutor told the jury that the defendant had to show someone else committing the crime was "probable" and that proof beyond a reasonable doubt did "not" mean proof "beyond every reasonable doubt," trial judge Ford approved such misstatements of law by erroneously instructing the jury that:

" Proof beyond reasonable doubt does not mean ... proof beyond all reasonable doubt, the mere possibility of innocence"  
(June 29 1992 transcript page 97)

**APPLICATION OF THE LAW TO THE FACTS:**

The combined misstatements of law created confusion as to what degree of reasonable doubt was sufficient for acquittal, or skewed the meaning of "reasonable doubt" to a degree that it became incomprehensible, as decisional law, infra, supports such findings.

This is not a case where a prosecutor made a single isolated



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misstatement of law, United States v. Grassrope, 342 F. 3d 866 870-871 (8th Cir. 2003)(collecting cases), although even a single misstatement of law by a state prosecutor supports 28 USC §2254 Federal Habeas Corpus relief when trial evidence may be fairly characterized as weak, Pagano v. Allard, 218 F. Supp. 2d 26, 32-38 (D.C. Mass. 2002)<sup>4</sup>

This is also not a case where jury instructions merely "contain(ed) one slip" on reasonable doubt, Gaines v. Matesanz, 272 F. Supp. 2d 121, 133-134 (D.C. Mass. 2003), although a single isolated misstatement of reasonable doubt does support granting a new trial, Commonwealth v. Pickles, 393 Mass. 775, 776-780 (1984); Commonwealth v. Wood, 380 Mass 545, 547-551 (1980) and Justice Abrams did forewarn judges to avoid the mistake made in the case at bar four years before the defendant's 1992 trial, Commonwealth v. Santos 402 Mass. 775, 788 (1988).

The misconduct here was not "slight or confined to a single instance, but ... was pronounced and presistant, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential," Berger v. United States, 295 U.S. 78, 89 (1935).

In the case at bar the prosecutor deliberately and forcefully argued that proof beyond a reasonable doubt paralogically means the state's burden is "not beyond every reasonable doubt"

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<sup>4</sup> At page 90 of the June 29, 1992 transcript Judge Ford complements the experienced state prosecutor for how he conducted the trial while no curative instructions were given for the obviously improper closing argument misstatements of law (06/29/92 Trans. page 55).

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clearly approved by judge Ford instructing "proof beyond a reasonable doubt does not mean ... proof beyond all reasonable doubt," which "essentially told the jurors that they needed some undefined amount" of reasonable doubt, which "defied comprehension," Lanigan v. Maloney, 853 F. 2d 40, 46-47 (1st Cir. 1988)("a degree of moral certainty" ... "not beyond an absolute doubt"). The "cumulative effect" of two paralogical misstatements of reasonable doubt "was to obfuscate one of the essentials of due process and fair treatment," Dunn v. Perrin, 570 F. 2d 21, 25 (1st Cir. 1978) and falls into the category of "structural error," Sullivan v. Louisiana, 508 U.S. 275, 280-282 (1993).

With respect to the improper closing argument in the case at bar, this case falls under a cumulative prejudice analysis similar to "the comments in Caldwell (which) were approved by the trial judge, "Darden v. Wainwright, 477 U.S. 168, 183 n. 15 (1985)(distinguishing argument which did not implicate a specific constitutional right) citing Caldwell v. Mississippi, 472 U.S. 320, 339-340 (1985)(improper argument was "focused, unambiguous and strong").

The trial judge's repeating the obviously confusing misstatement of law by the prosecutor "placed a stamp of imprimatur on the prosecutor's statement, ensuring the denial of the (defendant's) constitutional right," Pagano v. Allard, 218 F. Supp. 2d 26, 35 (D.C. Mass. 2002) to be proven guilty beyond a reasonable doubt, by creating the "appearance of judicial approval," Mahorney v. Wallman, 912 F2d 469, 473 n. 4 (10th Cir. 1990)(writ granted when prosecutor's misstatement of law

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specifically allowed by state trial judge).

No physical evidence linked defendant Luis Rivers to the crime scene and only cooperating witnesses with deals and motive to lie testified directly against him at trial, Commonwealth v. Rivera, 424 Mass. 266 (1997). Such errors are not harmless where a case turns on witness credibility, Mahorney v. Wallman, supra, 917 F. 2d at 474; Pagano v. Allard, supra, 218 F. Supp. 2d at 36-37, or where a main government witness has questionable credibility, United States v. Beale, 921 F. 2d 1412, 1425 (11th Cir. 1991); United States v. Beckman, 222 F. 3d 512, 524-527 (8th Cir. 2000) or where there is a question of credibility of several witnesses, United States v. Crutchfield, 26 F. 3d 1098, 1103 (11th Cir. 1994) and is not harmless error where three cooperating witnesses with deals had a motive to lie, United States v. Blakey, 14 F. 3d 1557, 1561 (11th Cir. 1994) even when other evidence tends to circumstantially corroborate cooperating witnesses, Coppola v. Powell, 878 F. 2d 1562, 1569-1571 (1st Cir. 1989) and still does not become harmless error when eight(8) cooperating witnesses with deals implicate a defendant, United States v. Hands, 184 F. 3d 1322, 1326-1334 (11th Cir. 1999). Without a confession, an incorrect explanation of reasonable doubt cannot be harmless error, Lanigan v. Maloney, 853 F. 2d 40, 50 (1st Cir. 1988) even when other evidence "was substantial," Dunn v. Perrin, 570 F. 2d 21, 25 (1st Cir. 1978); Commonwealth v. Wood, supra; Commonwealth v. Pickles, supra; Commonwealth v. Sullivan, 20 Mass. App. Ct. 802, 803-807 (1983).

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Where, as here, the trial depended on witnesses questionable credibility, the two erroneous explanations of reasonable doubt cannot be deemed to be harmless error, Commonwealth v. Kelleher, 395 Mass 821, 8220828 (1985); Commonwealth v. Rembiszbowski, 391 Mass 123 (1984).

**GROUND THREE: THE DEFENDANT'S CONVICTION WAS UNLAWFULLY OBTAINED THROUGH MULTIPLE NON-STRATEGIC OMISSIONS BY INCOMPETENT AND INEFFECTIVE ASSIGNED C.P.C.S. ATTORNEY ALAN BLACK, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND MASS. DECLARATION OF RIGHTS ARTICLE 12**

**FACTS SUPPORTING GROUND THREE:**

As attorney Black is expected to admit in his evidentiary hearing testimony that he had no strategic reason for failing to object to ground two, supra, misstatements of the law on reasonable doubt, that he totally failed to prepare the defendant to testify, failed to interview witnesses and failed to call the main state witnesses (Jose Pacheco's) mother to testify he was with her at the time of the offenses.

The defendant's affidavit verifies he was not prepared to testify by attorney Black and after he is prepared by new counsel he shall testify truthfully to his actual innocence at the evidentiary hearing in this case.

**APPLICATION OF THE LAW TO THE FACTS:**

Following the 1985 decision in A Juvenile, supra, the 1986 decision in Quirk, supra, and the 1988 decision in Santos, supra, any minimally competent lawyer would have made a strong contemporaneous objection to ground two supra, obviously prejudicial misstatements of law on reasonable doubt by both the trial prose-

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cutor and trial judge, Mello v. DiPaulo, 295 F. 3d 137, 148 (1st Cir. 2002) ("the Commonwealth's contention that the prosecutor's closing argument must not have been so prejudicial if Mello's counsel failed to object plainly misses the point"). After attorney Alan Black testifies, this court should make a Mass. Crim. P. Rule 30(b) finding that defendant Rivera "has shown that the failure(s) to object (were) based on simple incompetence and not on trial strategy," Washington v. Hofbauer, 228 F. 3d 689, 707 (6th Cir. 2000); Cargle v. Miller, 317 F. 3d 1196, 1217 (10th Cir. 2003); Cox v. Donnelly, 267 F. Supp. 2d 418 (E.D. N. Y. 2003); Corsa v. Anderson, 443 F. Supp. 176, 178 (E.D. Mich. 1977); Oyola v. Boles, 947 F. 2d 928, 930-935 (11th Cir. 1991); Gray Lynn, 6 F. 3d 263, 269-270 (5th Cir. 1993); Commonwealth v. Kane, 19 Mass. App. Ct. 129, 142 (1984).

Similarly, attorney Black being too lazy to obtain Jose Pacheco's bail hearing transcript of the undisclosed deal falls under ground four, infra, cumulative error analysis "in connection with a claim that petitioner's trial attorney was ineffective for failing to investigate adequately whether a witness had a deal with prosecutor's," Cargle v. Mullin, 317 F. 3d 1196, 1216 (10th Cir. 2003) and "the prejudice flowing from such counsel error is magnified here by crucial nature of (Pacheco's) testimony to the state's case," Id. The related failure to interview and call Jose Pacheco's mother to testify that Pacheco was home with her at the time of the murders, thereby exposing the deliberately false testimony presented by prosecutors, clearly amounted to ineffective assistance of trial counsel,



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Commonwealth v. Farley, 432 Mass. 153, 156 (2002); Pavel v. Hollins, 261 F. 3d 210, 219-229 (2nd Cir. 2001); Berryman v. Morton, 100 F. 3d 1089, 1096-1102 (3rd Cir. 1996); Griffin v. Warden, 970 F. 2d 1355, 1358 (4th Cir. 1992); Harris v. Reed, 894 F. 2d 871, 878-879 (7th Cir. 1990); Chambers v. Armontrout, 885 F. 2d 1318, 1320-1224 (8th Cir. 1989); Lord v. Wood, 184 F. 3d 1083, 1093-1095 (9th Cir. 1999); Fisher v. Gibson, 282 F. 3d 1283, 1289-1311 (10th Cir. 2002); Scott v. Wainwright, 698 F. 2d 427, 429-430 (11th Cir. 1983) because "an attorney who fails to interview a readily available witness whose non-cumulative testimony may potentially aid the defense should not be allowed automatically to defend his omissions simply by raising the shield of trial strategy and tactics," Crisp v. Duckworth, 743 F. 2d 580, 584 (7th Cir. 1994); United states Ex Rel Cosey v. Wolff, 562 F. Supp. 871, 878-879 (N.D. Ill. 1983), grant of writ affirmed 727 F. 2d 656 (7th Cir. 1984); Sullivan v. Fairman, 819 F. 2d 1382, 1389 (7th Cir. 1987).

This is true because "counsel's anticipation of what a potential witness would say does not excuse the failure to find out," United States v. Moore, 554 F. 2d 1086, 1093 (D.C. Cir. 1976); United States v. Gray, 878 F. 2d 702, 711-712 (3rd Cir. 1989) and "an attorney's performance is deficient when he or she fails to conduct any investigation into exculpatory evidence and has not provided any explanation for not doinf so, Stevens v. Deleware Correctional Center, 152 F. Supp. 2d 561, 576 (D. Del. 2001). Attorney Black's testimony must be taken at an evidentiary hearing on his failure to obtain a bail hearing



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transcript to verify Pacheco's deal, and failure to interview and call Pacheco's mother to testify, Commonwealth v. Aviles, 40 Mass. App. Ct. 440, 443-447 (1996) as well as both Black's and defendant's testimony taken at an evidentiary hearing on lazy attorney Black's complete failure to prepare the defendant to testify, Commonwealth v. Licata, 421 Mass. 654, 661-662 (1992).

The defendant's right to testiy is one of the most basic and fundamental components of the right to present a defense, Rock v. Arkansas, 483 U.S. 44 (1987) and a failure to prepare or a lack of knowing, intelligent and voluntary wavier claim cannot properly be resolved without an evidentiary hearing, Gallego v. United States, 174 F. 3d 1196, 1198-1199 (11th Cir. 1999) where, as here, attorney Black never advised the defendant that it was solely the defndant's decision, as required by C.P.C.S. Rules, and completely failed to prepare him to testify. After a full evidentiary hearing this sub-claim is sufficient standing alone to support an order for a new trial, Commonwealth v. Freeman, 29 Mass. App. Ct. 635, 639-641 (1990); United States v. Butts, 630 F. Supp. 1145, 1146-1148 (D. Me. 1986); Deluca v. Lord, 858 F. Supp. 1330, 1350-1360 (S.D. N.Y. 1994).

New assigned counsel is required to obtain evidence corroborating the defendant's new trial motion testimony.

**GROUND FOUR: THE DEFENDANT'S CONVICTION WAS UNLAWFULLY OBTAINED BY THE PROSECUTOR'S KNOWING AND DELIBERATE PRESENTATION OF FALSE TESTIMONY AND CONCEALMENT OF A BAIL RELEASE DEAL WITH CO-DEFENDANT JOSE PACHECO WHOSE CHARGES WERE DISMISSED AS A REWARD FOR HIS PERJURED TESTIMONY, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**

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AND ARTICLE 12 OF THE MASSACHUSETTS DECLARATION  
OF RIGHTS

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FACTS SUPPORTING GROUND FOUR:

Prior to and during trial the prosecutor falsely claimed there were no deals with the main state witness Jose Pacheco, that he did not get out on bail as part of any deal, and ground three, supra, ineffective attorney Alan Blck failed to obtain Pacheco's bail release hearing transcript, which must now be ordered with the prosecutor's file and notes also ordered produced at the ground four evidentiary hearing. The affidavit of Jose Pacheco avers he was released on bail as part of a deal.

Jose Pacheco did not witness the defendant commit any crime and did not witness the murders [as corroborated by Pacheco's testimony conflicting with crime scene evidence and other witnesses]. Pacheco was at his mother's house in Holyoke at the time of the murders and was not at the crime scene. Although not admissible into evidence without stipulation of agreement from the prosecutor, Pacheco is willing to take a polygraph to verify he did not witness the murders, as is standard practice for federal prosecutors and other state's prosecutors to verify or refute a cooperating witnesses story.

Hampden County prosecutor Howard Safford verbally told Jose Pacheco that in return for his testimony he would be released on low bail and not prosecuted for joint-venture participation in the offenses.

Jose Pacheco's murder related charges were dismissed and

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he was released on bail, as records newly assigned counsel is obtaining shall verify.

**APPLICATION OF THE LAW TO THE FACTS:**

As an initial matter the prosecutor's files and notes must be ordered produced and, after In Camera Judicial inspection, disclosed, while Pacheco's bail release hearing transcript ordered and evidentiary hearing testimony heard from attorney Charles Stephenson, prosecutor Howard Safford, witness Jose Pacheco, and corroborating witness Francis Pabon; Commonwealth v. Hill, 432 Mass. 704, 710 n. 15 (2000); Blackmon v. Scott, 22 F. 3d 560, 564-567 (5th Cir. 1994)<sup>5</sup>.

The truthful affidavit of Pacheco with his polygraph verified evidentiary hearing truthful testimony of not being present at the scene of the murders, presents an actual innocence based independant due process violation or right to fundamentally fair trial because a state cannot leave a conviction in place after a credible recantation by a main witness most likely would have changed the outcome of the trial, Sanders v. Sullivan, 900 F. 2d 601, 602-608 (2nd Cir. 1990)(release ordered by writ of habeas corpus when main witnesses' post-conviction affidavit filed admitting the witness committed perjury by falsely testifying at trial he saw a defendant shoot and kill someone).

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<sup>5</sup> The dismissal of Pacheco's charges and bail release presents a more compelling foundation for a hearing than Commonwealth v. Holmes, 46 Mass. App. Ct. 550, 560-561 (1999) Habeas Corpus pending Holmes v. Pepe 06-10995-RCL (2002 briefing for 2004 decision).

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Because "little direct or circumstantial evidence supported either side's version of events," Ellsworth v. Warden, 333 F. 3d 1, 9 (1st Cir. en banc 2003) (Torrudla, J., concurring) and "the materiality inquiry is a context specific determination," Spicer v. Roxbury Correctional Institution, 194 F. 3d 547, 560 (4th Cir. 1999) the bail hearing transcript verification of a deal can support an order for a new trial based on the weak uncorroborated evidence in this case, even if the later dismissal of charges claim is not verified.

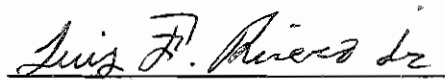
However, if dismissal of charges is found to be part of the undisclosed deal, then a new trial must be granted, Commonwealth v. Collins, 386 Mass. 1, 8-12 (1982); Commonwealth v. Hill, supra, 431 Mass. at 711-720; Ely v. Matesanz, 983 F. Supp. 2d 21, 35-45 (D.C. Mass. 1997); Jenkins v. Artuz, 294 F. 3d 284, 292-297 (2nd Cir. 2002).

#### CONCLUSION

Counsel must be assigned and after a full evidentiary hearing a new trial must be granted<sup>6</sup>.

Most Respectfully Submitted,

November 6, 2003  
given to prison staff to  
mail November 5, 2003

  
Luis Rivera Pro Se  
P.O. Box 100  
South Walpole, Ma 02071

Copy served on:  
District Attorney William Bennett  
50 State Street Street  
Springfield, Ma

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<sup>6</sup> Or if either the Superior Court erroneously denies ground two  
(continued next page)

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<sup>6</sup>(continued from previous page)  
and three on the merits ground one relief of vacating and re-  
imposing the condition to restart 28 USC §2244 one year clock  
for 28 USC §2254 Federal Habeas Corpus review, must be allowed  
as the appropriate remedy for ineffective assistance of direct  
appeal counsel.

FILED  
IN CLERKS OFFICE  
2007 NOV 30 A 10:04  
U.S. DISTRICT COURT  
DISTRICT OF MASS.

**EXHIBIT #8**

December 28, 2004 Petition for Writ of Habeas Corpus w-attachments  
(10 pages)



## PETITION UNDER 28 USC § 2254 FOR WRIT OF

## HABEAS CORPUS BY A PERSON IN STATE CUSTODY

241 (Rev. 5/85)

<b>United States District Court</b>		District OF MASSACHUSETTS
Name LUIS RIVERA	Prisoner No. W-52832	Case No. 04-12717-RCL
Place of Confinement MCI-CEDAR JUNCTION POST OFFICE BOX 100 SOUTH WALPOLE, MA 02071		
Name of Petitioner (include name under which convicted) LUIS RIVERA		Name of Respondent (authorized person having custody of petitioner) V. DAVID NOLAN, SUPERINTENDENT
The Attorney General of the State of: MASSACHUSETTS (THOMAS REILLY)		

## PETITION

- Name and location of court which entered the judgment of conviction under attack HAMPDEN COUNTY  
SUPERIOR COURT, HALL OF JUSTICE, 50 STATE STREET, SPRINGFIELD, MA 01102
- Date of judgment of conviction JUNE 29, 1992
- Length of sentence 2 NATURAL LIFE SENTENCES (NO PAROLE), 4-5 ON AND AFTER
- Nature of offense involved (all counts) 2 COUNTS FIRST DEGREE MURDER, UNLAWFUL CARRYING OF A FIREARM.
- What was your plea? (Check one)
  - (a) Not guilty ☒
  - (b) Guilty ☐
  - (c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:
- If you pleaded not guilty, what kind of trial did you have? (Check one)
  - (a) Jury ☒
  - (b) Judge only ☐
- Did you testify at the trial?  
Yes ☐ No ☒
- Did you appeal from the judgment of conviction?  
Yes ☒ No ☐

FD-242 (Rev. 5/85)

9. If you did appeal, answer the following:

(a) Name of court SUPREME JUDICIAL COURT(b) Result JUDGMENT AFFIRMED(c) Date of result and citation, if known FEBRUARY 13, 1997 (424 MASS. 266)(d) Grounds raised SEE SJC'S DECISION (ATTACHED HERETO)

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court N/A(2) Result N/A(3) Date of result and citation, if known N/A(4) Grounds raised N/A

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court SUPREME JUDICIAL COURT(2) Result CERTIORARI WAS DENIED ON 10/13/1998(3) Date of result and citation, if known RIVERA V. MASSACHUSETTS, U.S. (19 )

1. WHETHER DEFENDANT WAS DENIED A FAIR TRIAL BY THE COMMONWEALTH'S

(4) Grounds raised INTERFERING WITH INTERVIEWING OF COMMONWEALTH'S WITNESS AND DEFENSE ATTORNEY; 2, WHETHER DEFENDANT WAS DENIED HIS RIGHT TO COUNSEL AND TO REMAIN SILENT.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court UNITED STATES DISTRICT COURT(2) Nature of proceeding HABEAS CORPUS PETITION  
1 ERRONEOUS DENIAL OF MOTION TO SUPPRESS PETITIONER'S STATEMENTS; 2, ERRONEOUS DENIAL OF WITNESSES; 3, ERRONEOUS ADMISSION OF PREJUDICIAL EVIDENCE; 4, IMPROPER CLOSING STATEMENTS BY PROSECUTOR.(3) Grounds raised SUPRA

AO 241 (Rev. 5/85)

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result

(6) Date of result

(b) As to any second petition, application or motion give the same information:

(1) Name of court HAMPDEN SUPERIOR COURT(2) Nature of proceeding NEW TRIAL MOTION

(3) Grounds raised 1. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BY OMISSION OF MERITORIOUS APPELLATE GROUNDS ON DIRECT APPEAL; 2. CONVICTION UNLAWFULLY OBTAINED DUE TO TWO RELATED MISTATEMENTS OF PROOF BEYOND A REASONABLE DOUBT IN PROSECUTOR'S CLOSING ARGUMENT AND JURY INSTRUCTIONS; 3. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO OBJECT AND FAILURE TO CALL NECESSARY WITNESS FOR DEFENSE; AND 4. THE CONVICTION WAS UNLAWFULLY OBTAINED BY PROSECUTOR'S KNOWING AND DELIBERATE PRESENTATION OF FALSE TESTIMONY AND CONCEALMENT OF EXCULPATORY EVIDENCE, WHICH VIOLATED PETITIONER'S SIX AND FOURTEENTH AMENDMENT RIGHTS.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒(5) Result NEW TRIAL MOTION DENIED(6) Date of result NOVEMBER 20, 2003 (SEE SJ-2004-0338, denied 12/14/04)

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐(2) Second petition, etc. Yes ☒ No ☐(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

AD 241 (Rev. 5/85)

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: \_\_\_\_\_

SEE ATTACHMENT

Supporting FACTS (state *briefly* without citing cases or law) \_\_\_\_\_

SEE ATTACHMENT

B. Ground two: \_\_\_\_\_

SEE ATTACHMENT

Supporting FACTS (state *briefly* without citing cases or law) \_\_\_\_\_

SEE ATTACHMENT

AG-241 (Rev. 5/85)

C. Ground three: \_\_\_\_\_

SEE ATTACHMENT

Supporting FACTS (state *briefly* without citing cases or law) \_\_\_\_\_

SEE ATTACHMENT

D. Ground four: \_\_\_\_\_

SEE ATTACHMENT

Supporting FACTS (state *briefly* without citing cases or law) \_\_\_\_\_

SEE ATTACHMENT

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: \_\_\_\_\_

N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing ALAN J. BLACK, 1383 MAIN STREET, SPRINGFIELD  
MA. 01103

(b) At arraignment and plea (SAME AS ABOVE)



AO 241 (Rev. 5/85)

(c) At trial (SAME AS ABOVE)(d) At sentencing (SAME AS ABOVE)(e) On appeal JAMES A COUTURE, 10 SOUTH MAIN STREET, P.O. BOX 63,  
BELCHERTOWN, MA 01007(f) In any post-conviction proceeding PRO SE(g) On appeal from any adverse ruling in a post-conviction proceeding PRO SE

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: \_\_\_\_\_

(b) Give date and length of the above sentence: \_\_\_\_\_

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

PRO SE

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

DECEMBER 20, 2004

(date)

Luis P. Rios 2

Signature of Petitioner



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

LUIS RIVERA, )  
 )  
 Petitioner, )  
 )  
 V. )  
 )  
 DAVID NOLAN, )  
 )  
 Respondent. )

Civil Action No. 04-12717-RCL

PETITION FOR HABEAS CORPUS  
ATTACHMENT

A. Ground One: The convictions were unlawfully affirmed through the non-strategic omission of meritorious grounds from direct appeal by incompetent and ineffective appellate counsel in violation of petitioner's Sixth and Fourteenth Amendment rights and rights secured under Article 12 of the Massachusetts Declaration of rights.

Supporting facts: Although for years prior to petitioner's 1992 trial the case law in Massachusetts made clear that the errors asserted in ground two and three of this petition warranted relief from conviction, appellate counsel on direct appeal omitted these meritorious grounds from his brief, thereby causing petitioner the loss of an otherwise available substantial ground of defense and forcing him to have to seek SJC gatekeeper permission to bring these appellate grounds to the full bench. These grounds, particularly when viewed under the collective error standards, were significantly stronger than the grounds actually raised by appellate counsel, and more likely to result in the reversal of the convictions at issue. Due to appellate

counsel's ineffectiveness, the second and third grounds raised herein could not be brought in petitioner's first habeas corpus petition.

Specifically, appellate counsel's failure to argue on direct appeal that the prosecutor's mistatement of the burden of proof during his closing argument was prejudicial, and trial counsel ineffective for not objecting thereto and seeking a mistrial, curative instructions or other remedial measures, constituted ineffective assistance of appellate counsel. Appellate counsel's failure to argue on direct appeal that the trial judge's exacerbation of the prosecutor's mistatement of the burden of proof, by his erroneous instruction on the issue, also warranted appellate relief, constituted ineffectiveness of appellate counsel.

Appellate counsel's failure to argue on direct appeal that trial counsel was ineffective for failing to object to the mistatement of the burden of proof by the prosecutor, and the incorrect definition of same by the trial judge, as well as trial counsel's non-strategic failure to prepare defendant to testify, to interview witnesses and to call the state's main witness's mother to testify, constituted ineffectiveness of appellate counsel as well.

B. Ground Two: The convictions were unlawfully obtained by two related mistatements of proof beyond a reasonable doubt in prosecutor's closing argument and in the jury instructions, in violation of the Sixth and Fourteenth

Amendments and Article 12 of the Massachusetts Declaration of rights.

Supporting Facts: Because the prosecutor during closing statements mistated the burden of proof, and the trial judge compounded the error by himself giving an incorrect definition of what constitutes proof beyond a reasonable doubt, petitioner received an unconstitutional trial in violation of rights secured to him by the Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of rights.

C. Ground Three: The conviction was unlawfully obtained through multiple non-strategic omissions by incompetent ineffective counsel at trial in violation of the Sixth and Fourteenth Amendments and Article 12 of the Massachusetts Declaration of rights.

Supporting Facts: Through trial counsel's non-strategic failure to object to the improper and prejudicial mistatement of the burden of proof by the prosecutor during his closing, and the exacerbation of the error by the trial judges who gave an incorrect and prejudicial definition of proof beyond a reasonable doubt, as well as his failure to prepare the defendant to testify, to interview witnesses and to call the main state witness's mother to testify that he was with her at the time of the alleged crimes, trial counsel rendered ineffective assistance in violation of petitioner's Sixth and Fourteenth Amendment rights and Article 12 of the Massachusetts Declaration of rights.

D. Ground Four: The conviction was unlawfully obtained by the prosecution's knowing and deliberate presentation of false testimony and concealment of exculpatory evidence in violation of the Fourteenth Amendment and Article 12 of the Massachusetts Declaration of rights.

Supporting Facts: Because the prosecutor knowingly and deliberately presented false testimony to the jury and concealed evidence that was clearly exculpatory in nature (i.e. a bail release deal with the key prosecution witness who was a co-defendant in the case), the convictions at issue were unlawfully obtained in violation of rights secured to petitioner by the Fourteenth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of rights. See affidavit of Jose Pacheco, and attached New Trial Motion, incorporated herein by references.

For the foregoing reasons, the petition for writ of habeas corpus should be granted.

Dated: December 20, 2004

Respectfully submitted,

Luis P. Rivera  
Luis Rivera, pro se  
Box 100  
South Walpole, MA 02071

VERIFICATION

I Luis Rivera declare under the pains and penalties of perjury that the foregoing is true and correct to the best of my personal knowledge.

Dated: December 20, 2004

Luis P. Rivera  
Luis Rivera



DREA J. CABRAL  
SHERIFF

## Suffolk County Sheriff's Department

Jail  
200 Nashua Street  
Boston, MA 02114  
(617) 635-1100

House of Correction  
20 Bradston Street  
Boston, MA 02118  
(617) 635-1000



FILED  
IN CLERKS OFFICE  
NOV 30 P 12:07  
U.S. DISTRICT COURT  
DISTRICT OF MASS.

Michael J. Sullivan, Esq.  
U.S. Attorney for Massachusetts  
One Courthouse Way, Suite 9200  
Boston, MA 02210

Re: U.S. v. Fredrick Grey, aka Freddy Grey, aka King Free, U.S.  
District Court No. 06CR10271-RGS; Defendant's DOB: 5/21/79;  
Defendant's SSN: 011-60-5753; FBI File Nos. 245D-BS-96365 and  
823038FB3.

Dear Mr. U.S. Attorney:

Relative to the above-described defendant, enclosed please find a request for immediate disposition pursuant to the Interstate Agreement on Detainers (IAD). An original and a photocopy are enclosed. Please forward the photocopy to the federal government's IAD Coordinator.

To coordinate extradition with someone at this end, please contact Jennifer Morris, Records Supervisor, (617) 635-1000 x2181.

Thank you for your attention to this matter.

Very truly yours,

November 28, 2007

*James T. McDavitt*

James T. McDavitt, Esq.  
Inmate Legal Services  
Suffolk County House of Correction  
20 Bradston Street  
Boston, MA 02118  
617-635-1000 x2178

cc: IAD Coordinator, Mass. Dept. of Corr., 50 Maple Street, Suite 3, Milford, MA, 01757  
Clerk for Criminal Business, U.S District Court, One Courthouse Way, Boston MA 02210

John M. Woudenberg, Supervisory Special Agent, c/o FBI, One Center Plaza, Suite 600, Boston, MA 02108  
Inmate/Defendant, c/o SCHC (#0703099)  
Records Division, SCHC;  
File



**FORM 2**  
**AGREEMENT ON DETAINERS**

Five copies, if only one jurisdiction within the state involved has an indictment, information or complaint pending. Additional copies will be necessary for prosecuting officials and clerks of court if detainers have been lodged by other jurisdictions within the state involved. One copy should be retained by the prisoner. One signed copy should be retained by the warden. Signed copies must be sent to the Agreement Administrator of the state which has the prisoner incarcerated, the prosecuting official of the jurisdiction which placed the detainer, and the clerk of the court which has jurisdiction over the matter. The copies for the prosecuting officials and the court must be transmitted by certified or registered mail, return receipt requested.

**Inmate's Notice of Place of Imprisonment and Request for Disposition**  
**of Indictments, Informations or Complaints**

**TO: Michael J. Sullivan, U.S Attorney for Mass.,  
One Courthouse Way, Suite 9200, Boston, MA 02210**

And to all other prosecuting officers and courts of jurisdictions listed below from which indictments, informations or complaints are pending.

**YOU ARE HEREBY NOTIFIED** that the undersigned is now imprisoned in:

**SUFFOLK COUNTY HOUSE OF CORRECTION  
20 BRADSTON STREET, BOSTON, MA 02118  
ATTN: RECORDS DEPARTMENT  
(617) 635-1000 x2181**

And I hereby request that a final disposition be made of the following indictments, informations or complaints now pending against me:

**U.S. District Court Dkt. No. 06CR10271-RGS (Possession of Controlled Substance With Intent to Distribute (to counts); Punishment As A Principal (two counts); Conspiracy (one count); in violation of U.S. Code, Title 21, sections 841 (a) (1) (two counts) and 846 (one count), and Title 18, Section 2 (two counts)**

Failure to take action in accordance with the Agreement on Detainers, to which your state is committed by law, will result in the invalidation of the indictments, informations or complaints.

I hereby agree that this request will operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against me from your state. I also agree that this request shall be deemed to be my waiver of extradition with respect to any charge or proceeding contemplated hereby or included herein, and a waiver of extradition to your state to serve any sentence imposed upon me, after completion of my term of imprisonment in this state. I also agree that this request shall constitute a consent by me to the production of my body in any court where my presence may be required in order to effectuate the purposes of the Agreement on Detainers and a further consent voluntarily to be returned to the jurisdiction in which I am now confined.

If jurisdiction over this matter is properly in another agency, court, or officer, please designate the proper agency, court or officer and return this form to the sender.

The required Certificate of Inmate Status and Offer of Temporary Custody are attached.



 November 28, 2007  
**Fredrick Grey aka Freddy Grey aka King Free**

**Booking Number 0703099**

Suffolk County House of Correction  
20 Bradston Street  
Boston, MA 02118

The inmate must indicate below whether he/she has counsel or wishes the court in the receiving state to appoint counsel for purposes of any proceedings preliminary to trial in the receiving state that may take place before his/her delivery to the jurisdiction in which the indictments, informations or complaints are pending. Failure to list the name and address of counsel will be construed to indicate the inmate's consent to the appointment of counsel by the appropriate court in the receiving state.

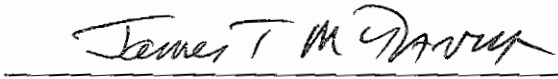
A. I have no counsel and would like counsel appointed.

I have read the above or have had the above read and explained to me and I understand its meaning and agree thereto.

 November 28, 2007  
**Fredrick Grey aka Freddy Grey aka King Free**

**Booking Number: 0703099**

Suffolk County House of Correction  
20 Bradston Street  
Boston, MA 02118

 November 28, 2007  
**Witness: James T. McDavitt, Esq.**

**Inmate Legal Services**

Suffolk County House of Correction  
20 Bradston Street  
Boston, MA 02118  
617-635-1000 x2178

**FORM 3**  
**AGREEMENT ON DETAINERS**

In the case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form 2. In the case of a request initiated by a prosecutor under Article IV, a copy of this Form should be sent to the prosecutor upon receipt by the warden of Form 5. Copies also should be sent to all other prosecutors in the same state who have lodged detainers against the inmate. A copy may be given to the inmate.

**CERTIFICATE OF INMATE STATUS**

**RE: Fredrick Grey aka Freddy Grey aka King Free**  
**Booking Number: 0703099**  
Suffolk County House of Correction  
20 Bradston Street  
Boston, MA 02118

**The Superintendent hereby certifies:**

1. The term of commitment under which the above named is being held: (913) days
2. The time already served: (249) days
3. Time remaining to be served on the sentence:  
(642) days (inmate has 22 days Earned Good Time)
4. The possible good time discharge date: 4/21/09
5. The date of parole eligibility of the prisoner: 6/23/08
6. The decisions of the Board of Parole relating to the prisoner: N/A
7. Maximum expiration date under present sentence(s): 8/31/09
8. The detainer currently on file against the inmate, from your jurisdiction, is: detainer issued in U.S. District Court No. 06CR10271-RGS.

Sheriff Andrea J. Cabral

Nov. 28, 2007

By: \_\_\_\_\_

Gerard Horgan, Supt.

**FORM 4**  
**AGREEMENT ON DETAINERS**

In the case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form 2. In case of a request initiated by a prosecutor this Form should be completed after the Governor has indicated his approval of the request for temporary custody or after the expiration of the 30 day period. Copies of this Form should be sent to all officials who previously received copies of Form 3. One copy also should be given to the prisoner and one copy should be retained by the warden. Copies mailed to the prosecutor should be sent by certified or registered mail, return receipt requested.

**OFFER TO DELIVER TEMPORARY CUSTODY**

**TO:** Michael J. Sullivan, U.S. Atty. for Mass., One Courthouse Way, Suite 9200, Boston MA 02210

And to all other prosecuting officers of jurisdictions listed below from which indictments, informations or complaints are pending.

**RE:** Fredrick Grey aka Freddy Grey aka King Free  
Booking Number: 0703099  
Suffolk County House of Correction  
20 Bradston Street  
Boston, MA 02118

Dear Sir/Madam:

Pursuant to the provisions of Article V of the Agreement on Detainers between this state and your state, the undersigned hereby offers to deliver temporary custody of the above-named prisoner to the appropriate authority in your state in order that speedy and efficient prosecution may be had of the indictment, information or complaint which is described in the attached inmate's request.

The Certificate of Inmate Status is enclosed.

If proceedings under Article IV(d) of the Agreement are indicated, an explanation is attached.

Indictments, informations or complaints charging the following offenses are also pending against the inmate in your state and you are hereby authorized to transfer the inmate to custody of appropriate authorities in these jurisdictions for purposes of disposing of these indictments, information and complaints.

Offense: N/A

County or Other Jurisdiction:

If you do not intend to bring the inmate to trial, will you please inform us as soon as possible.

November 28, 2007

Sheriff Andrea J. Cabral

By: 

Gerard Horgan, Superintendent  
Suffolk County House of Correction  
20 Bradston Street  
Boston, MA 02118